No. 20724

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

KENNETH G. WALKER and NANCY M. WALKER,

Appellants,

vs.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,

Appellee.

APPELLANTS' OPENING BRIEF

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APPELLANT'S OPENING BRIEF.

Come now the defendants and appellants, Kenneth G. Walker and Nancy M. Walker, and do respectfully pray of the Honorable United States Court of Appeals for the Ninth Circuit that the within cause be dismissed as to them and that this Court hold that the United States District Court, the Honorable Harry C. Westover, Judge Presiding, erred in denying the motion of these defendants and appellants for a dismissal of this action for want of jurisdiction.

I.

Chronological Statement Re Interlocutory Appeal.

(a) On *December 22, 1965* appellants filed in the United States District Court, Southern District of California, Central Division, their

> "Notice of Motion and Petition for an Order and Judgment of the Honorable Court Dismissing the Within Action as to Defendants, Kenneth G. Walker and Nancy M. Walker and Memorandum of Law in Support of Motion." [Clk. Tr. p. 1184.]

(b) On *January 10th and 11th, 1966* the motion to dismiss was heard and argued before the Honorable Harry C. Westover.

(c) On *January 14, 1966,* the United States District Court issued and filed its "Order Denying Motions to Dismiss and Certifying Controlling Question of Law Pursuant to 28 U.S.C. Sec. 1292(b)." [Clk. Tr. p. 1248.]

The aforementioned "Order" provides in part as follows:

> "The undersigned is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order as authorized by 28 U.S.C. Sec. 1292(b) may materially advance the ultimate termination of this litigation . . ." [Clk. Tr. p. 1248.]

(d) On *January 21, 1966,* appellants filed in the United States Court of Appeals for the Ninth Circuit their "Application for Permission to Appeal Pursuant to 28 U.S.C. 1292(b)."

(e) On *February 1, 1966,* the United States Court of Appeals granted leave to appeal from interlocutory decision. (Before: Barnes, Jertberg and Ely, Circuit Judges.)

(f) On *February 4, 1966,* defendants and appellants filed their "Notice of Appeal." [Clk. Tr. p. 1251.]

(g) On *February 4, 1966,* defendants and appellants filed their "Designation of Record on Appeal." [Clk. Tr. p. 1254.]

(h) On *February 4, 1966,* defendants and appellants filed their "Points to be Relied Upon on Appeal." [Clk. Tr. p. 1259.]

(i) On *February 8, 1966,* "Application of Defendants and Appellants, Kenneth G. Walker and Nancy M. Walker for Order Staying Trial, Pretrial, Deposition and Interrogatory Proceedings Pending Appeal" was filed in the Court of Appeals.

(j) On *February 10, 1966,* the Honorable Court of Appeals filed its "Order on Motion" staying the trial and pre-trial pending final determination of the appeal. (Before: Jertberg, Koelsch and Ely, Circuit Judges.)

(k) On *March 15, 1966,* defendants and appellants filed in the United States Court of Appeals their "Statement of Point and Designation of Record."

II.

Error as to Jurisdiction.

The Honorable United States District Court erred by its order made on January 14, 1966, denying the motion of defendants and appellants to dismiss and in deciding that the United States District Court has jurisdiction of this action.

III.

Brief Statement of Facts.

(a) The within action is one to foreclose numerous Deeds of Trusts securing numerous Notes.

(b) All of the notes were made, executed and delivered within the State of California.

(c) All of the Deeds of Trust were made, executed and delivered within the State of California.

(d) *None* of the notes were executed by defendants and appellants Kenneth G. Walker or Nancy M. Walker.

(e) No guarantees of any of the notes or obligations were ever executed by defendants and appellants Kenneth G. Walker or Nancy M. Walker.

(f) No federal question is involved.

(g) The Complaint seeks a deficiency judgment against appellants, Kenneth G. Walker and Nancy M. Walker, on the grounds that the corporate makers of the Notes were "alter egos" of said defendants, and that the total plan concerning the Notes and Trust Deeds in question constituted a "joint venture" in which the corporate makers of the Notes and the individuals Kenneth G. Walker and Nancy M. Walker were engaged.

(h) All of the Notes, secured by such deeds of trust, were made, executed, delivered and payable in the State of California.

(i) All property securing such Notes is located in Orange County, State of California.

(j) Plaintiff sues as an assignee of such Notes.

(k) All property described or referred to in the numerous deeds of trust is located in the County of Orange, State of California.

(l) At the time the various notes and deeds of trust were made, executed and delivered, all parties thereto were residents of the State of California.

IV.

Plaintiff's Alleged Basis for Jurisdiction.

Plaintiff has commenced these proceedings in the United States District Court, a Court which has no jurisdiction over the the subject matter or over the defendants.

Plaintiff erroneously bases the jurisdiction of the Honorable District Court on the following grounds:

1. That *28 U.S.C. Section 1444* relating to a United States tax lien authorizes jurisdiction.

2. That plaintiff is a wholly owned government corporation as referred to in *31 U.S.C. Section 846.*

3. That plaintiff is an instrumentality of the United States.

4. That *12 U.S.C. Section 1725* authorizes the plaintiff to bring the within action in the United States District Court.

5. That *28 U.S.C. Section 1345* and *12 U.S.C. Section 1437 (b)* authorize the plaintiff to bring this action in the United States District Court. [Pltf. Complaint, Clk. Tr. p. 2; p. 4, lines 9-29 incl.]

The jurisdictional issues involved will hereafter be discussed separately.

V.

28 U.S.C. 1444 Does Not Confer Jurisdiction in the United States District Court.

28 U.S.C. 1444 provides as follows:

> "Any action brought under *Section 2410* of this title *against* the United States in any State Court may be removed by the United States to the District Court of the United States for the District and Division in which the action is pending." (Italics added.)

28 U.S.C. 2410 relates to property on which the United States has or claims a lien and provides, among other things, for the manner in which a lien of the United States may be extinguished.

Plaintiff erroneously bases jurisdiction under *28 U.S.C. 1444* and *2410* upon the allegations set forth in Paragraph 2295 of the Complaint [Complaint, p. 4, line 29, Clk. Tr. p. 2.]

Paragraph 2295 of the Complaint alleges that the defendant, United States of American claims two income tax liens on Lot 68 of Tract No. 3111, City of Buena Park, County of Orange. [See *448th Cause of Action, Paragraph 2291 to 2295 inclusive, p. 893, line 12 to p. 895, line 6.*]

The alleged liens are claimed against Charles R. Shinnefield, aka Russ Shinnefield, Ingrid M. Shinnefield and Charles R. Shinnefield dba Chas. R. Shinnefield Plastering Co.

Nowhere is it alleged or claimed that appellants, Kenneth G. Walker and Nancy M. Walker, claim or have any interest in said Lot 68 and appellants are not, even remotely, involved with any determination relating to such claimed liens.

In addition, the claimed liens relate only the *448th* cause of action and to no other claims alleged in the Complaint which consists of *467 causes of action.*

These appellants have no interest of any nature in the property referred to in the 448th cause of action (Lot 68); they have no interest in and no involvement in, the tax liens alleged; the tax lien issue, if such is in issue, does not relate to the other alleged 466 causes of action.

28 U.S.C. 2410 is *not* in itself a grant of jurisdiction but, when jurisdiction exists, constitutes a waiver of immunity by the United States and consent by the United States to be sued in an action to foreclose a mortgage or Deed of Trust upon which the United States claims a lien. (*Gerth v. United States,* D.C. Cal., 1955, 132 F. Supp. 894.)

District Court jurisdiction in this case as to Kenneth G. Walker and Nancy M. Walker cannot be based upon

a cause of action involving property and claimed tax liens in which they do not have, and are not alleged to have, any interest.

28 U.S.C. 1444 and *28 U.S.C. 2410* do not confer jurisdiction on the United States District Court. These statutes are a waiver of sovereign immunity only. (*Wells v. Long* (9th Circuit 1947), 162 F. 2d 842, at 844; See also *Remiss v. United States,* First Circuit 1960, 273 F. 2d 293, 294; *Cooper Agency, Inc. v. McLeod,* 1964, 235 F. Supp. 276, 284.)

VI.

The Allegation That Plaintiff Is a Wholly Owned Government Corporation as "Referred to in 31 U.S.C. 846" Does Not Confer Jurisdiction in the United States District Court.

31 U.S.C. 846 provides, in part, as follows:

> "*As used in this chapter,* the term 'wholly owned government corporation' means . . . Federal National Mortgage Association; . . . Federal Savings and Loan Insurance Corporation. . . ." (Italics added.)

It is called to the attention of the Honorable Court that the referral to the plaintiff as a "wholly owned government corporation" relates only, and is limited to, the provisions of *Chapter 14* of *31 U.S.C. (i.e. "As used in this chapter".)*

A reading of *Chapter 14, 31 U.S.C.* indicates that it does not even remotely pertain to jurisdiction, but only relates to internal operations of the numerous corporations listed in *31 U.S.C. 846 re* auditing and reporting procedures. The referral to the plaintiff as a

"wholly owned government corporation" is a referral for descriptive and designation purposes only for the uses and only as such term is used in *Chapter 14, 31 U.S.C. 846.*

Specifically, plaintiff is not a wholly owned government corporation.

It is obvious that the use of the words "wholly owned government corporation" as used in 31 U.S.C. 846 are only a convenient term for referring to the various corporations regulated by *Chapter 14 of Title 31 re* accounting and reporting procedures. The sole purpose of *Chapter 14, 31 U.S.C. 846* is set forth and declared in *31 U.S.C. 841:*

> ". . . to bring government corporations and their transactions and operations under annual scrutiny by the Congress and provide current financial control thereof."

31 U.S.C. 846 is certainly not a grant of jurisdiction to the United States District Court nor was it ever intended that the wording of such section be used in interpreting jurisdictional statutes.

We have called to the attention of the Court that the *"Federal National Mortgage Association"* is referred to in *31 U.S.C. 846* as a "wholly owned government corporation."

With relation to the Federal National Mortgage Association, it is quite obvious that such is not a wholly owned government corporation. Its shares of capital stock are traded over the counter. The United States Government owns approximately $500,000.00 of the preferred shares of stock and approximately 1,000,000

shares of the common stock of the Federal National Mortgage Association are traded over the counter and are owned by private individuals and entities and not by the United States.

The inclusion of the Federal National Mortgage Association as a corporation within *31 U.S.C. 846* makes it quite obvious that such corporations are termed "wholly owned government corporations" only for the purposes of Chapter 14 and for no other purpose.

The Court may take judicial notice of the ownership of the capital stock of public corporations. (*Federal Savings and Loan Insurance Corporation v. Third National Bank* (B.C. M.D. Tenn. 1945), 60 F. Supp. 110, 114.) In taking judicial notice, the Court may "refresh its memory" by reference to any reliable source of information. (*Greeson v. Imperial Irrigation District* (9th Cir. 1952), 59 F. 2d 529, 531.) A common source of information for judicial notice regarding public corporations is the official publications of the corporation itself. (*Fletcher v. Jones* (D.C. Cir. 1939), 105 F. 2d 58, 61, 62.)

It will be shown that the United States is not the owner of any of the capital stock of plaintiff and that plaintiff comes within the prohibition of *28 U.S.C. 1349,* which provides as follows:

> "The District Courts shall *not* have jurisdiction of any Civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, *unless the United States is the owner of more than one-half of its capital stock.*" (Italics added.)

VII.

12 U.S.C. 1725 Does Not Empower, Authorize or Grant the United States District Court Jurisdiction of the Within Matter.

In 1934 the Federal Savings and Loan Insurance Corporation came into being. The statute creating the corporation, *12 U.S.C. 1725,* as originally worded in 1934, read, in part, as follows:

> ". . . (c) On June 7, 1934 the corporation shall become a body corporate, and shall be an instrumentality of the United States, and as such, shall have power —
>
> (1) to adopt and use a corporate seal.
>
> (2) to have succession until dissolved by Act of Congress.
>
> (3) to make contracts.
>
> (4) *to sue and be sued, complain and defend, in any Court of law or equity, State or Federal. . . .*" (Italics added.)

The quoted section was amended in 1935, 1948, 1950, 1954, 1955 and 1960 but the important amendment occurred in 1954.

In 1954, *12 U.S.C. 1725* was amended and such amendment affected in a material and important manner the above quoted section. *Section 1725* as amended in 1954 now reads, in part, as follows:

> ". . . (c) On June 27, 1934, the corporation shall become a body corporate, and shall be an instrumentality of the United States, and as such, shall have power —
>
> (1) to adopt and use a corporate seal.

(2) to have succession until dissolved by Act of Congress.

(3) to make contracts.

(4) *to sue and be sued, complain and defend, in any Court of competent jurisdiction in the United States or its territories or possession or the Commonwealth of Puerto Rico* and may be served by serving a copy of process on any of its agents, or any agent of the *Home Loan Bank Board* and mailing a copy of such process by registered mail to the corporation at Washington, District of Columbia. . . ." (Italics added.)

A comparison of the quoted paragraphs indicates that it was the intention of the Congress in its 1954 amendment to specifically limit the jurisdiction of the Federal Courts as it applied to matters involving the Federal Savings and Loan Insurance Corporation, where no federal question is involved.

The section expressly deleted the words *"in any Court of law or equity, State or Federal"* and in their place and stead inserted the words *"in any Court of competent jurisdiction in the United States or its territories or possession of the Commonwealth of Puerto Rico. . . ."*

It was the intention of Congress to allow actions not involving a federal question to be brought in a *"court of competent jurisdiction"*. The within action being one to foreclose Notes and Deeds of Trusts, made, executed and payable in the State of California, requires an examination of the applicable California law relating to Notes secured by Deeds of Trusts.

Article VI, Section 5 of the Constitution of the State of California provides as follows:

> ". . . The process of Superior Court shall extend to all parts of the States; provided, that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the County in which the real estate, or any part thereof, affected by such action or actions, is situated. . . ."

The constitutional provision pertains to Deeds of Trust. (*Appel v. Hubbard,* 155 Cal. App. 2d 639, 316 P. 2d 164 (1957).)

Section 726 of the Code of Civil Procedure of the State of California provides as follows:

> "There can be but one form of action for the recovery of any debt, or the enforcement of any rights secured by mortgage upon real property, which action must be in accordance with the provisions of this chapter. . . ."

Article VI, Section 5 of the Constitution of the State of California, sets forth a rule of fundamental and basic jurisdiction and if an action within its terms is not commenced in the proper County, the Court has no jurisdiction of the subject matter. (*Rogers v. Cady,* 104 Cal. 288, 38 Pac. 81; *Southern Pacific Railway Co. v. Pixley,* 103 Cal. 118, 37 Pac. 194; *Fritts v. Camo,* 94 Cal. 393, 29 Pac. 857.)

> "First, in 1933, the legislature enacted Section 396 of the Code of Civil Procedure, which, as amended in 1935, provides that when an action or proceeding is commenced in a Court which lacks jurisdiction, 'if there is a Court of this State which has such jurisdiction, the action or proceeding shall not be dismissed . . . but shall, on the application of

either party, or on the Court's own motion, be transferred to a Court having jurisdiction of the subject matter . . . and it shall thereupon be entered and prosecuted in the Court to which it is transferred as if it had been commenced therein, all prior proceedings being safe.' In further recognition of the fact that, prior to its enactment, the penalty of dismissal for failing to file the action in the correct Court, entailed not only loss of time, energy and money in the prosecution of an action which constituted a nullity, but often the loss of any remedy through passage of the Statute of Limitation, Section 396 provided further, 'an action or proceeding which is transferred under the provisions of this section shall be deemed to have been commenced at the time the Complaint or petition was filed in the Court from which it was originally transferred.' *Of course, even today, if neither Court nor counsel in an improperly commenced action notice the defect, the plaintiff's rights may still be lost, notwithstanding Section 396, if the action proceeds to final judgment, thereby precluding transfer.*" (*Vol. 1, California Pleading, Civil Actions, Sec. 261, pp. 172-173, Chadbourn, Grossman-VanAlstyne, 1961 Edition.*) (Italics added.)

"As any other situation in which the application of *Section 5 of Article VI of the Constitution* is in question, *the determination is reached from an analysis of the Complaint.* 'When it is alleged that the party against whom a personal judgment is sought is also interested in the real property, and a foreclosure of this interest is sought, the action, as to such party, is one to foreclose a lien. . . .'"

Vol. 1, California Pleading, Sec. 266, p. 182, Chadbourn, Grossman-VanAlstyne, citing Case v. Kirkwood, 119 Cal. App. 207, 6 P. 2d 110, 111.)

The Constitution of the State of California and the California law relating to Notes and Deeds of Trust require that the within action be commenced and brought in the Superior Court of Orange County and further require and demand that no other Court has jurisdiction.

No law of the United States has altered, changed or modified the requirement that this action as to Kenneth G. Walker and Nancy M. Walker must be commenced in the Superior Court in which the land encumbered by the Deeds of Trusts is located.

We have present in this cause a state constitutional provision requiring that an action such as in the within proceedings must be brought in the Superior Court of Orange County. *Title 12, U.S.C. Section 1725,* as amended, has not changed this jurisdictional requirement and is expressly consistent with such jurisdictional requirement.

The Notes involved in this litigation were originally executed in favor of Long Beach Federal Savings and Loan Association and such Notes are alleged by the plaintiff to have been assigned by such association to plaintiff.

Under the law and facts in this case, only the Superior Court in the County of Orange (the County wherein the land encumbered by the Deeds of Trust is located) has jurisdiction in this matter.

The *Federal Savings and Loan Insurance Corporation*, among other things, provides insurance to savings

and loan associations. The *Federal Deposit Insurance Corporation* is its counterpart with relation to providing insurance to banks. *12 U.S.C. Section 1819,* which relates only to the Federal Deposit Insurance Corporation is almost identical to *12 U.S.C. Section 1725* which relates to the Federal Savings and Loan Insurance Corporation.

However, the statute relating to the Federal Deposit Insurance Corporation differs in a most important fashion from its counterpart. It is at once noted that *12 U.S.C. Section 1819* grants greater jurisdiction to Federal Deposit Insurance Corporation matters than *Title 12 U.S.C. 1725* grants to the Federal Savings and Loan Insurance Corporation. The similarity between the statutes and the obvious difference is at once apparent.

Title 12 U.S.C. 1819 provides in part as follows:

> "Upon June 16, 1933 the corporation shall become a body corporate and as such shall have power—
> First. To adopt and use a corporate seal. Second. To succession until dissolved by an act of Congress.
> Third. To make contracts.
> Fourth. *To sue and be sued, complain and defend in any Court of law or equity, state or federal. All suits of a civil nature, at law or in equity, to which the corporation shall be a party shall be deemed to arise under the laws of the United States;* provided, any such suit to which the corporation is a party in its capacity as receiver of a State Bank and which involves only the rights or obligations of depositors, creditors, stockholders,

and such State Bank under state law shall not be deemed to arise under the laws of the United States. . . ." (Italics added.)

Section "Fourth" of *12 U.S.C. 1819* differs greatly from Section (4) of *12 U.S.C. 1725*. The Federal Deposit Insurance Corporation has the right to sue and be sued in any Court of law or equity, state or federal and the statute expressly provides that any suits involving the Federal Deposit Insurance Corporation will be deemed to arise under the laws of the United States. No such comparable provision is found in 12 U.S.C. 1725 relating to the Federal Savings and Loan Insurance Corporation.

Prior to its amendment, *12 U.S.C. 1725* (relating to the Federal Savings and Loan Insurance Corporation) used almost the identical wording as now appears in *12 U.S.C. 1819, i.e.*:

"(4) To sue and be sued, complain and defend, in any Court of law or equity, state or federal. . . ."

However, Section *12 U.S.C. 1725,* as amended in 1954, has deleted those words and the statute now reads:

"(4) To sue and be sued, complain and defend, in any Court of *competent jurisdiction* in the United States. . . ." (Italics added.)

The Federal Deposit Insurance Corporation was created prior to the Federal Savings and Loan Insurance Corporation and though the statutes are extremely similar, they do differ greatly with relation to jurisdiction. The Federal Deposit Insurance Corporation was granted greater latitude in jurisdiction than that granted to the Federal Savings and Loan Insurance Cor-

poration, and such difference is apparent by a reading of the two statutes.

The reason for the existing difference between these statutes is logical. The activities of savings and loan associations center primarily around dealings in real property. In other words, a savings and loan association engages in operations which are local and peculiar to the particular state in which it is situated. Congress has merely recognized the local nature of these operations by allowing each state authority to determine proper jurisdiction in an action brought by the Federal Savings and Loan Insurance Corporation where no federal violation is involved.

Cases involving the Federal Deposit Insurance Corporation are not relevant to the issue now before the Court for two reasons. First, the aforementioned 1954 amendment to *12 U.S.C. 1725* expressed a congressional intent contrary to that expressed by *12 U.S.C. 1819* relating to banks. Second, *12 U.S.C. 1819* provides that actions involving the Federal Deposit Insurance Corporation are deemed to arise under the laws of the United States. No such provision exists in *12 U.S.C. 1725* relating to the Federal Savings and Loan Insurance Corporation.

In the case of *Federal Savings and Loan Insurance Corporation v. Third National Bank in Nashville* (Civil Action No. 337—District Court, M.D. Tenn., Nashville Division), decided April 5, 1945 and reported in 60 F. Supp. 110 the same issue was before the Court. This case was decided prior to the time that 12 U.S.C. 1725 was amended in 1954. The Federal Savings and Loan Insurance Corporation in the above men-

tioned case sought to base jurisdiction of the District Court upon the following grounds:

(1) That plaintiff is a corporate instrumentality of the government of the United States incorporated by an Act of Congress wherein the government of the United States is the owner of more than one-half of its capital stock. (*28 U.S.C. 42.*)

(2) That the act of Congress by and under which the plaintiff was created conferred federal jurisdiction by express grant. (*12 U.S.C. 1725(c)(4)).*

(3) That this is a suit of a civil nature wherein the matter in controversy exceeds, exclusive of interest and cost, the sum or value of $3,000.00 and arises under the laws of the United States. (28 U.S.C. Section 41 (1)(a).)

The defendant moved to dismiss for lack of jurisdiction over the subject matter. In support of its motion, defendant stated that the Court was without jurisdiction for the reason that while the plaintiff is a corporation created by an Act of Congress, its capital stock is not owned by the government of the United States, but is, in fact, owned by the Home Owners Loan Corporation, a separate corporation, the stock of which is in turn owned by the government of the United States; that by reason of the provisions of *Title 28, U.S.C. Section 42*, the District Court was without jurisdiction because the government was not in fact the owner of more than one-half of the capital stock of plaintiff. The Court referred to *12 U.S.C. 1725* and further referred to *28 U.S.C. Section 42*, which provided as follows:

> "No District Court shall have jurisdiction of any action or suit by or against any corporation upon

the ground that it was incorporated by or under an act of Congress. This section shall not apply to any suit, action or proceeding brought by or against a corporation incorporated by or under an act of Congress wherein the government of the United States is the owner of more than one-half of its capital stock."

(Memo: *28 U.S.C. 42* was recodified in 1948 and now exists as *28 U.S.C. 1349.*)

Plaintiff's position was that it was an instrumentality of the government of the United States, was created by an Act of Congress and empowered to sue and be sued, complain and defend, in any Court of law or equity, federal or state, and that by reason of the fact that the government of the United States is the owner of the entire capital stock of the Home Owners Loan Corporation, that both the Home Owners Loan Corporation and plaintiff are parts of the government of the United States and the suit therefore was one arising under the laws of the United States.

The Court stated that *until February 13, 1925* it was well settled that a suit for whatever reason by or against a corporation created under an Act of Congress with power to sue or be sued in any Court, state or federal, was a suit arising under the laws of the United States; that under the decisions of the Supreme Court such a suit arises under the laws of the United States, not because of the character of the suit, nor the relief demanded, but merely because the plaintiff suing or the defendant sued is a federal corporation with power to sue or be sued in any Court, state or federal. (Citing *Osborn v. Bank of United States,* 9 Wheat. 738, 6 L.

Ed. 204; *Union Pacific Railway Company v. Myers,* 115 U.S. 1, 5 S. Ct. 1113, 29 L. Ed. 319.)

On February 13, 1925, the statute above quoted, *i.e. Title 28, U.S.C. Section 42* was enacted, changing the rules of law in effect up to that date. The Court further stated that the issue was whether or not the ownership of plaintiff's stock by the Home Owners Loan Corporation amounts to ownership by the government of the United States. The Home Owners Loan Corporation was created by Act of June 13, 1933, *Title 12 U.S.C. Section 1463,* which provides that the stock of the Home Owners Loan Corporation

> "shall be subscribed for by the Secretary of the Treasury on behalf of the United States, . . . the corporation shall issue to the Secretary of the Treasury receipts for payment by him for or on account of such stock and such receipts shall be evidence of the stock ownership of the United States. . . ."

The Court held that while the Home Owners Loan Corporation is an instrumentality of the government of the United States it is at the same time a properly organized corporation having complete corporate jurisdiction. (Citing *Fletcher v. Jones,* 70 App. D.C. 179, 105 F. 2d 58; *United States ex rel. Fletcher v. Fahay,* 73 App. D.C. 257, 121 F. 2d 28.)

The government did not have direct ownership of the shares of stock of the Federal Savings and Loan Insurance Corporation and even though the United States might be the owner once removed the stock of the Federal Savings and Loan Insurance Corporation was in fact owned by the Home Owners Loan Corporation and

not by the United States even though the United States owned all of the stock of the Home Owners Loan Corporation.

Likewise, the Court affirmed that *statutes relating to the jurisdiction of the United States Courts are to be strictly construed.*

> "The effect of the act of February 13, 1925 was to remove from the jurisdiction of the federal courts such cases arising under the laws of the United States as suits by or against Federal Corporations in which the government was not the owner or more than one-half of the capital stock, thereby further limiting the jurisdiction of the courts of the United States. *It is also well settled that statutes relating to the jurisdiction of the United States are to be strictly construed. Elgin v. Marshall,* 106 U.S. 578, 1 Sup. Crt. 484, 27 Law Ed. 249; *Grace v. American Central Insurance Co.,* 109 U.S. 278, 3 Sup. Crt. 207, 27 Law Ed. 932; *Healy v. Ratta,* 292 U.S. 263, 54 Sup. Crt. 700, 78 Law Ed. 1248." (Italics added.)

The Home Owners Loan Corporation being a distinct, separate legal entity and owning the capital stock of the Federal Savings and Loan Insurance Corporation resulted in such stock constituting a part of the assets of the Home Owners Loan Corporation and such stock was liable for the debts of the Home Owners Loan Corporation and *was subject to attachment and execution on the part of creditors.* If the stock were owned by the government of the United States, it would not be subject to attachment on the part of a general creditor. The Court further stated that it was not at all unusual in the business world for corporations to own stock in

other corporations and that it had never been determined that a stockholder of a parent corporation by reason of his ownership of said stock thereby becomes a stockholder in the subsidiary corporation.

The Court held that the United States was not the owner of more than one-half of the capital stock of the Federal Savings and Loan Insurance Corporation and that therefore the District Court did not have jurisdiction on that basis and the mere fact that the Federal Savings and Loan Insurance Corporation was created by an Act of Congress did not grant jurisdiction to the District Court.

The allegations that the matter in controversy exceeded the sum of $3,000.00 or that jurisdiction was based upon the issues because they involved issues arising under the "laws of the United States", or that the Federal Savings and Loan Insurance Corporation was an instrumentality of the United States, or that both the Federal Savings and Loan Insurance Corporation and the Home Owners Loan Corporation were a part of the "government of the United States", were held insufficient to grant or reflect jurisdiction in the United States District Court.

The Federal Savings and Loan Insurance Corporation contended that the case arose under the laws of the United States and reflected a violation of *12 U.S.C. Section 1731(e)* in that the defendant violated a Federal Statute. On the argument relating to the violation of a federal statute, the District Court held that the Complaint was one basically to enforce a violation of the state common law or state law and not one to enforce the violation of a federal law.

The Court further stated that the jurisdiction of the United States District Court is not a special privilege conferred upon governmental agencies; jurisdictional statutes are not to be considered in any protective sense, and that due regard for the independence of state governments required that federal courts scrupulously confine their own jurisdiction to the precise limits defined by statute. It was held that whether a suit is within Federal District Court jurisdiction as arising under federal law must appear from plaintiff's pleadings and not from defenses interposed or anticipated and that a genuine and present controversy, not merely a possible or conjectural one, must exist with reference to federal jurisdiction on the ground that the federal law was involved.

The District Court in its opinion specifically held that no violation of federal law was involved.

The cases referred to was appealed and reversed in *Federal Savings and Loan Insurance Corporation v. Third National Bank in Nashville,* No. 10047, 10048, Circuit Court of Appeals, 6th Circuit, February 9, 1946, 153 F. 2d 678; the reversal was only on the ground that the Federal Savings and Loan Insurance Corporation was seeking to enforce the violation of a *federal statute* and that therefore, the litigation arose "under the laws of the United States within the meaning of Section 1(a) of the Judiciary Act of 1875. *28 U.S.C. Section 41(1)(a).* (Since repealed.) Because the Complaint alleged that the defendant had violated a federal statute, the Court on appeal held that it arose under the laws of the United States and the District Court had jurisdiction. The reversal was made solely upon that one ground and the Court expressly did not reverse upon any other ground.

In the within litigation the defendant and appellants, Kenneth G. Walker and Nancy M. Walker, are not charged or accused of violating any federal law. In fact, no federal law is involved in these proceedings.

The opinion of the District Court in Federal Savings and Loan Insurance Corporation v. Third National Bank in Nashville, 60 F. Supp. 110, *has never been overruled or criticized with relation to its position on the Federal Savings and Loan Insurance Corporation where the litigation does not expressly involve the violation of a federal statute.*

The Court properly held that plaintiff was not (i) a corporate instrumentality of the government of the United States incorporated by an act of Congress wherein the government of the United States is the owner of more than one-half of its capital stock and (ii) that *12 U.S.C. 1725(c)(4)* did not confer jurisdiction in the District Court. The reversal did not affect or alter the decision of the District Court on such points of law.

The *Federal Savings and Loan Insurance Corporation v. Third National Bank in Nashville* cases, cited *supra,* are even more germain when one realizes that *12 U.S.C. 1725* was amended in 1954, as aforesaid, and jurisdiction relating to actions involving the Federal Savings and Loan Insurance Corporation was expressly limited to "*courts of competent jurisdiction.*"

The Home Owners Loan Corporation was dissolved and abolished by the *Act of June 30, 1953, C. 170 Section 21, 67 Statutes 126,* and the title to any real property held by the Home Owners Loan Corporation was transferred to the United States of America. The capi-

tal stock of the Federal Savings and Loan Insurance Corporation (formerly owned by the Home Owners Loan Corporation) was retired and purchased back by the Federal Savings and Loan Insurance Corporation, and payment made to the Treasury of the United States for such stock.

The United States does not own any shares of stock in the Federal Savings and Loan Insurance Corporation but is in the position of directing and supervising the Federal Savings and Loan Insurance Corporation through the Federal Home Loan Bank Board, which acts as a board of trustees. The Federal Savings and Loan Insurance Corporation is wholly self-supporting. (*Publication of the Federal Home Loan Banks, 1961, entitled "The Federal Home Loan Bank System" Library of Congress, Catalogue Card No. 61-60073, pp. 24 through 26 incl.*)

The Federal Home Loan Bank, also supervised by the Federal Home Loan Bank Board, issues capital stock to member institutions who receive dividends on their investments which are paid out of earnings.

> "Originally, nearly $125,000,000.00 of capital stock had been provided by the federal government. By 1948, however, member-held stock exceed the government's investment in the banks and in July 1951 the last of the treasury-held stock was retired. Since then, capital stock held by member institutions has risen sharply. By the end of 1960, member institutions had invested $989,000,000.00 in the capital

stock of their respective Federal Home Loan Banks." (*The Federal Home Loan Banks System,* cited *supra,* p. 30.)

The obligations of the Federal Home Loan Bank are neither direct or indirect liabilities of the United States. The banks are subject to Federal Taxes but are exempt from most state and local taxation of principal and interest. (*The Federal Home Loan Bank System,* cited *supra,* p. 31.)

The Federal Savings and Loan Insurance Corporation, insofar as its capital stock is concerned, is not owned by the United States; it is controlled and operated by the Federal Home Loan Bank Board as is the Federal Home Loan Bank.

The Federal Home Loan Bank Board is composed of three members appointed by the President by and with the advice and consent of the Senate. (*12 U.S.C. 1437.*)

"The Federal Home Loan Bank Board was originally created for the sole purpose of directing and supervising the operations of the bank's system. In the course of time, the Congress assigned additional related duties to the Board. In 1933, when it authorized the establishment of Federal Savings and Loan Associations, the Congress placed the responsibility for chartering and supervising these institutions in the Board. In 1934, when the law providing for the insurance of accounts in Savings and Loan Associations was enacted, the Congress designated the Federal Home Loan Bank Board as the Board of Trustees of the Federal Savings and

Loan Insurance Corporation, which was created to administer this program. For many years the Board was also in charge of the operation of the Home Owners Loan Corporation, which was established in 1933 as an emergency agency for the refinancing of home loans and which has long since been liquidated . . . *the entire operation of the Bank Board is self-supporting and requires no appropriations from the federal treasury. All of the Board's expenses are paid from assessments on the Federal Home Loan Banks and on the Federal Savings and Loan Insurance Corporation, (which meets its own expenses from insurance premiums charged to insured institutions)*; from fees for the examination of those institutions which are subject to the Board's supervision; and from similar charges. . . ." (*The Federal Home Loan Bank System,* cited *supra,* pp. 10 and 11.) (Italics added.)

The Federal Savings and Loan Insurance Corporation is a separate, profit making, self-supporting corporate entity supervised by the Federal Home Loan Bank Board, acting as a Board of Trustees. This situation existed at the time of the decisions in *Federal Savings and Loan Insurance Corporation v. Third National Bank in Nashville* (1945), cited *supra.*

12 U.S.C. 1725, as amended, does not confer jurisdiction upon the United States District Court as to appellants Kenneth G. Walker and Nancy H. Walker.

VIII.

28 U.S.C. Section 1345 and 12 U.S.C. Section 1437 (b) Does Not Empower or Authorize or Grant the United States District Court Jurisdiction of the Within Matter.

Title *28 U.S.C. Section 1345* provides as follows:

> *"Except as otherwise provided by act of Congress,* the District Courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof *expressly authorized to sue by Act of Congress."* (Italics added.)

Title 28 U.S.C. Section 1349 provides as follows:

> "The District Courts shall *not* have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an act of Congress, unless the United States is the owner of more than one-half of its capital stock." (Italics added.)

Title 28 U.S.C. Section 1349 is an express limitation upon the jurisdiction of the District Courts and limits *28 U.S.C. 1345,* and *12 U.S.C. 1725(c)(4).*

The United States does not own any of the capital stock of the Federal Savings and Loan Insurance Corporation and is not liable for any of its obligations.

12 U.S.C. 1437(b) provides as follows:

> "The Home Loan Bank Board which was, pursuant to reorganization plan No. 3 of 1947, established and made a constituent agency of the Housing and Home Finance Agency shall, from August 11, 1955, cease to be such a constituent agency and shall be an independent agency (including the Fed-

eral Savings and Loan Insurance Corporation) in the executive branch of the Government; provided, that the functions vested in the chairman of said Board under Clause (2) of the last sentence of subsection (b) of Section 2 of said reorganization plan are transferred to said Board. Notwithstanding any other provision of law, said Board, the Chairman thereof except as herein otherwise provided, and the Federal Savings and Loan Insurance Corporation, respectively, shall have and may exercise all functions which they respectively had or could exercise, immediately *prior to August 11, 1955* or immediately prior to *June 24, 1954*. Said Board shall annually make a report of its operations (including those of the Federal Savings and Loan Insurance Corporation) to the Congress as soon as practicable after the first day of January each year. The name of the Home Loan Bank Board is changed to 'Federal Home Loan Bank Board'."

A reading of the above quoted section definitely reflects that it was not the intention of Congress to extend or grant jurisdiction by virtue of enacting *12 U.S.C. 1347* in that it specifically refers to the Federal Savings and Loan Insurance Corporation having no greater rights than it had prior to August 11, 1955 or prior to June 24, 1954.

The amendment of *12 U.S.C. 1725* which limited jurisdiction of the Federal Savings and Loan Insurance Corporation in 1954 is consistent with the wording contained in *12 U.S.C. 1437. The language used in 1437(b) has nothing whatever to do with jurisdiction and relates only to the internal functions of the Federal Home Loan Bank Board.*

In addition, it is to be noted that *28 U.S.C. 1345* at the very outset contains the words "*Except as otherwise provided by Act of Congress*". It is quite obvious that Congress in enacting *12 U.S.C. 1725,* by enacting and recodifying *28 U.S.C. 1349* and by its amendment of *12 U.S.C. 1725* in 1954, has "*otherwise provided*".

Further, in ascertaining the intent and meaning of Congress in using the word "agency" in *28 U.S.C. 1345,* we must look to *28 U.S.C. 451,* which defines terms as used in Title 28:

> "As used in this title. . . .
> The term 'agency' includes any department, independent establishment, commission administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense."

In interpreting *28 U.S.C. 1345,* the meaning of the word "agency" must be obtained and used as set forth in *28 U.S.C. 451.*

It is quite obvious that a reasonable interpretation *of 28 U.S.C. 451* wherein it uses the words "department, independent establishment, commission, administration, authority, board or bureau of the United States" is not referring to the plaintiff or to any corporation organized under an Act of Congress, or any other type of corporation, which may or may not be an instrumentality or agency of the United States because the statute then goes on and uses the words "or any corporation in which the United States has a proprie-

tary interest, unless the context shows that such term was intended to be used in a more limited sense."

The latter portion of *28 U.S.C. 451* applies to corporations and the former portion does not. In determining the intent of Congress, and ascertaining what is meant by the use of *"proprietary interest,"* it is quite obvious that Congress was not talking about mere ownership. If it were, the United States could make any corporation, including General Motors, an agency of the United States by merely obtaining one share of stock in such corporation and such would give to the United States a proprietary interest. Therefore, in determining the use of the word "proprietary interest" we must ascertain the intention of Congress from the statutes. Such statute is readily available in *28 U.S.C. Section 1349* which provides that such corporate instrumentality, to enable it to bring suit in the District Court where no federal question is involved, is one in which the United States has a proprietary interest and such interest must be reflected by the ownership by the United States of more than one-half of its capital stock. In short, "proprietary interest" means ownership by the government of the United States of more than one-half of the capital stock of the said corporation.

To hold or reason otherwise would mean that the United States by owning one share of stock in any corporation could make such corporation an agency of the United States; certainly no such intention can be, or should be, imputed to Congress.

IX.

The Allegation That Plaintiff Is an "Instrumentality of the United States" Does Not Empower, Authorize or Grant Jurisdiction to Bring the Within Action in the United States District Court.

The prior discussions relating to *28 U.S.C. 1345, 28 U.S.C. 1349* and *12 U.S.C. 1725* fully indicate that the fact that a corporation is an "instrumentality of the United States" is insufficient in and of itself to authorize Federal District Court jurisdiction.

12 U.S.C. 1725, as amended, expressly provides that plaintiff shall be an "instrumentality of the United States," but its right to sue is limited and governed by sub-section (4) of *12 U.S.C. 1725,* and other statutes as heretofore discussed.

It was conceded by plaintiff's counsel at the oral arguments in this matter that the issues involved in this litigation do not involve any federal question or law. Such concession, though inconsistent with the allegations of jurisdiction in the Complaint, is apparent from "Plaintiff's Statement of Reasons and Memorandum of Points and Authorities in Opposition to Motion of Defendants Walker to Dismiss this Action for Lack of Jurisdiction," filed in the District Court. [Clk. Tr. p. 1228.]

X.

Conclusion.

In considering the issue here involved, it is wise to look at some of the attributes of plaintiff-appellee.

(1)It is not able to bind the government or the treasury of the United States.

(2) Its assets are not the assets of the United States.

(3) Its debts and obligations are its own and not that of the United States.

(4) None of its shares of stock are owned by the United States.

(5) Its assets are liable for its own debts.

(6) Its assets (including its shares of stock) are subject to being attached by its creditors.

(7) Its acts are not the acts of the government.

(8) Its conduct, as managed by the three member Federal Home Loan Bank Board, acting as trustees, is not subject to being overruled by the President of the United States.

(9) If it borrows from the government (which it never has) it becomes a bona fide debtor to the government.

(10) It is wholly self-supporting.

(11) It operates at a profit.

(12) It issues its own financial and operating statements.

No Court decision can be found which is contrary to the position taken by appellants in challenging the jurisdiction of the District Court in this matter.

Statutes relating to the jurisdiction of the United States are to be strictly construed. (*Elgin v. Marshall; Grace v. American Central Insurance Co.; Healy v. Ratta;* cited *supra*). Jurisdiction of the United States District Court is not a special privilege conferred upon government instrumentalities and jurisdictional statutes are not to be considered in any protective sense. Due regard for the independence of state governments requires

that federal courts scrupulously confine their own jurisdiction to the precise limits defined by statute.

Appellee concedes that no federal question is here involved. The action is one to foreclose deeds of trust securing notes and all property so encumbered is located within the County of Orange, State of California.

The Constitution of the State of California requires that the only forum with jurisdiction is the Superior Court of the State of California in and for the County of Orange. The mandate of the State constitution has not been overruled, modified or altered by any Act of Congress.

The integrity of local government, one of the basic protections and bastions of individual liberty, cherished by the framers of our Federal Constitution and revered by all free men, regardless of political affiliation, should not be trampled by overzealous conduct on the part of any instrumentality of the United States and a sound and just State Constitutional provision should not be rendered lifeless by self-serving erroneous implication.

Wherefore, it is respectfully prayed of the Honorable Court that the order made by the District Court on January 14, 1966, denying the motion of defendants and appellants to dismiss for lack of jurisdiction be reversed and that this cause be dismissed as to appellants Kenneth G. Walker and Nancy M. Walker.

Respectfully submitted,

BAUM & ARAN,

By LEONARD P. BAUM,

Attorneys for Defendants and Appellants Kenneth G. Walker and Nancy M. Walker.

Certificate.

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

LEONARD P. BAUM